Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1997

STATE OF SOUTH CAROLINA,

Petitioner,

v.

MARCUS A. FOWLER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF SOUTH CAROLINA

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Judicial Circuit

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QUESTIONS PRESENTED FOR REVIEW

I.

Did the South Carolina Court of Appeals incorrectly interpret and apply this Court's ruling in Terry v. Ohio, 392 U.S. 1 (1968), and its progeny, so as to ignore the totality of the circumstances present at the time of the stop?

II.

Did the South Carolina Court of Appeals incorrectly interpret and apply this Court's ruling in Terry v. Ohio, 392 U.S. 1 (1968), and its progeny, so as to require the police to have probable cause prior to an investigative Terry stop rather than reasonable articulable suspicion?

III.

Did the South Carolina Court of Appeals incorrectly interpret and apply this Court's ruling in Terry v. Ohio, 392 U.S. 1 (1968), and its progeny, so as to require the police to have either previously personally found a

weapon on an individual or know the individual has been convicted of carrying a weapon before a Terry frisk for weapons can be conducted?

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PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF SOUTH CAROLINA

The Solicitor of the Ninth Judicial Circuit of South Carolina, on behalf of the State of South Carolina, petitions for a writ of certiorari to review the judgment of the South Carolina Court of Appeals that affirmed a trial court ruling suppressing evidence.

OPINION BELOW

The Opinion of the South Carolina Court of Appeals affirming the trial court's ruling was filed on March 25, 1996. The case is reported as State v. Marcus Fowler, Op. No. 2490 (S.C. Ct. App. March 25, 1996),

and is appended hereto at pages 30-35. The State's Petition for Rehearing *en banc* was denied by the South Carolina Court of Appeals on June 20, 1996. The State's Petition for Writ of Certiorari to the Court of Appeals was denied by the Supreme Court of South Carolina on December 19, 1996, and the remittitur was sent to the Charleston County Court of General Sessions.

JURISDICTION

The Petition for Writ of Certiorari is for review of the opinion of the South Carolina Court of Appeals, which was a direct appeal by the State of the trial court's order of suppression, filed on March 25, 1996. This Court has jurisdiction to review the opinion issued below pursuant to 28 U.S.C. Section 1257 and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution, which provides that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the

persons or things to be seized."

2. The Due Process Clause of the Fourteenth Amendment to the United States Constitution, which provides: "Nor shall any state deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

During its May 1994 term of the Charleston County Grand Jury, Respondent was indicted for the offenses of possession of crack cocaine with intent to distribute and possession of crack cocaine with intent to distribute within proximity of a school. (ROA pp. 8-11).

On August 18, 1994, the case was called for trial before the Honorable R. Markley Dennis, Jr. Before beginning with a bench trial, a hearing was held on Respondent's motion to suppress.

During the course of the suppression hearing, evidence was presented to establish that at approximately 1:30 a.m. on March 8, 1994, Officers Blair and Campbell were on routine patrol in a marked police cruiser when they saw Respondent, who Officer Blair recognized because of his experiences with him in the past, coming from the front yard of a suspect drug house, in an area known

for its high crime rates and drug activity. (ROA p. 13, lines 20-25; p. 14, lines 12-14; p. 16, lines 6-23; p. 34, lines 11-13; p. 36, line 15 - p. 37, line 5; p. 59, lines 4-5). Respondent was with another individual, who was not known to the police officers. As they left the yard of the suspect drug house, Respondent went one way On Spruill Avenue and the other individual went the other way. (ROA p. 14, lines 1-3; p. 31, line 22 - p. 32, line 23; p. 36, line 15 - p. 37, line 5). The officers circled the area and, as they were driving down North Carolina Avenue at approximately 1:35 a.m., saw Respondent walking down that street. At that time, Respondent, who normally would waive or talk to Officer Blair when they saw each other, acted in a suspicious manner -- he saw the officers, appeared frightened upon seeing the officers, walked briskly away and, as he did so, turned to look at the officers, and generally appeared to be trying to elude the officers. (ROA p. 14, lines 4-11; p. 16, line 2 - p. 18, line 3; p. 34, lines 6 - p. 35, line 11; p. 40, line 17 - p. 41, line 16; p. 48, lines 7-14; p. 63, lines 4-13). Officer Blair identified Respondent to Officer Campbell; at that time, their knowledge of Respondent included

information that he had been seen by another officer holding a gun, he had on another occasion been seen what an officer believed to be illegal drugs, and he had been convicted of a drug charge. Officer Blair then told Officer Campbell to turn around so they could conduct a field interview of Respondent because he was acting suspiciously and they could find out what he was doing. (ROA p. 14, lines 12-15; p. 15, lines 15-25; p. 17, lines 10-11; p. 28, lines 7-19; p. 30, line 12 - p. 32, line 23; p. 34, line 6 - p. 44, line 8; p. 47, lines 9-21; p. 48, lines 7-25; p. 53, line 20 - p. 54, line 17; p. 55, lines 12-20; p. 58, line 20 - p. 60, line 11).

As the officers turned their car around, they observed that Respondent was no longer on North Carolina Avenue. They proceeded a short distance to Calder Street and saw him midway down the block on Calder Street walking quickly toward the Navy Base; Officer Campbell observed him walking behind some houses to get to Calder Street instead of walking to the corner of North Carolina Avenue and turning onto Calder Street, another aspect of Respondent's behavior that the officers thought was suspicious. (ROA p. 17, line 12 - p. 18, line 3; p. 38, line

20 - p. 39, line 5; p. 48, line 7 - 50, line 14; p. 55, lines 16-20; p. 59, lines 6-23; p. 60, lines 2-19).

When the officers drove up to Respondent, Officer Blair got out of the police cruiser and called out to him. The officer said that they would like to talk to him; Respondent stopped, looked around him and then just stood where he was. (ROA p. 18, lines 5-8). The location of the stop turned out to be near the Respondent's home, but that fact was not known to the officers at the time the stop was initiated. (ROA p. 60, lines 15-19; p. 62, lines 13-16).

Although Officer Blair's previous pat-downs of Respondent had not disclosed any weapons, he had been told by other officers that Respondent had not only been convicted of a drug charge and kept company with drug dealers, but also had had a gun in his possession on at least one occasion. Because of this information as to Respondent's possession of a gun,[1] Officer

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[1] The officer's fear that Respondent was armed with a deadly weapon was substantiated during the hearing by Respondent's own testimony that he regularly carried his knife on his person and, in fact, had it on his person when previously searched by the police. (ROA p. 75, lines 10-19).

Blair proceeded to pat-down Respondent out of concern for his and Officer Campbell's safety. (ROA p. 18, lines 9-22; p. 61, lines 6-13). During the pat-down, Officer Blair felt and recovered a lockblade knife in Respondent's left front pants' pocket. Respondent was then placed under arrest for carrying a concealed weapon in violation of a city ordinance -- a charge for which he was subsequently convicted. (ROA p. 18, line 12 - p. 20, line 4).

After Respondent was placed under arrest, the rest of his pockets were searched; that search disclosed no further weapons, but did disclose Five Hundred Four and 87/100 Dollars ($504.87). (ROA p. 19, lines 10-16; p. 20, lines 3-6). A routine strip search at the jail disclosed a clear plastic baggy, containing 7.05 grams of crack cocaine, wrapped around Respondent's penis. The plastic bag and its contents were seized.[2]

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[2] Under South Carolina law, possession of one gram of crack cocaine may give rise to the evidentiary inference that the drug was possessed with the intent to distribution; ten grams of crack cocaine is the minimum amount needed to prove the offense of trafficking in crack cocaine. S.C. Code Ann. Section 44-53-375 (Cum. Supp. 1994).

(ROA p. 20, line 9 - p. 21, line 2; p. 24, line 22). After being advised of his rights, Respondent orally confessed to selling crack cocaine to pay off a debt to a drug dealer. (ROA p. 20, line 3 - p. 23, line 24).

At the conclusion of the hearing, the trial court took the matter under advisement. Thereafter, the court issued an order granting the motion to suppress. (ROA pp. 3-6). That order read, in part, as follows.

> First, the Court finds the seizure of the Defendant to have been unconstitutional under the guidelines of Terry. The officers had no specific basis to reasonably believe that criminal activity was afoot. Both officers stated that they stopped the Defendant to conduct a field interview. (Transcript, pp. 22, 45). The mere facts that the Defendant had a prior drug charge, was spotted in a high crime area, came from the curtilage of a known drug house, and appeared to elude the officers do not amount to a reasonable suspicion of criminal

activity. The testimony additionally showed that neither officer observed a drug transaction (Transcript, pp. 24, 53.) nor saw the Defendant exit the alleged drug house (Transcript, pp. 23, 42.). Testimony indicated that the Defendant was actually near his house (Transcript, p. 57.) and most likely disappeared behind the nearby houses to follow well-worn paths across broken fences (Transcript, pp. 40-41).

Secondly, the Court finds the search, or frisk, of the Defendant to have been unconstitutional under the Terry standard. The officers articulated no objective suspicion that the Defendant possessed a weapon. Officer Blair testified that despite a suspected history of possession of a weapon, the Defendant had no prior weapon charges nor had he ever previously found one on the Defendant during previous searches. (Transcript, pp. 32-

> 33.) Officer Campbell testified that the Defendant did not do anything during the night of the arrest to make Officer Campbell think that he might be armed. (Transcript, p. 52.)

(ROA pp. 4-5).

The State timely appealed the trial court's ruling. After the filing of appellate briefs in this matter, the case was transferred to the South Carolina Court of Appeals. On January 11, 1996, the Court heard oral arguments and, on March 25, 1996, the Court filed its Opinion affirming the trial court's order. That Opinion read, in part, as follows.

> Here the facts do not support the State's position the officers had an articulable suspicion Fowler was involved in criminal activity. The officers did not see a drug transaction and did not even see Fowler throw anything down. The trial judge found he "most likely disappeared behind the nearby houses to follow well-worn paths across broken fences" in his own neighborhood. The officers, who knew

> Fowler had a prior drug conviction, basically made broad generalizations about his demeanor as they saw him leaving the curtilage of a suspected drug house.
>
> * * *
>
> Although one officer testified Fowler had a history of possessing weapons, Fowler had no prior weapons charges. Moreover, during previous searches, the police had not found weapons on Fowler. Another officer testified Fowler did not do anything the night of the arrest to make him think Fowler might be armed. These facts do not articulate a reasonable suspicion the officers believed the frisk was necessary to protect themselves or others.

(App. pp. 33-35).

The State timely filed a Petition for Rehearing En Banc with the South Carolina Court of Appeals. On June 20, 1996, the Court of Appeals denied the Petition. The State then timely petitioned the Supreme Court of South Carolina to review the Court

of Appeals's Opinion. The State's Petition for Writ of Certiorari to the Court of Appeals was denied by the Supreme Court of South Carolina on December 19, 1996.

REASONS FOR GRANTING THE WRIT

I.

The South Carolina Court of Appeals incorrectly interpreted and applied this Court's ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny, so as to ignore the totality of the circumstances and to require the police to have probable cause prior to an investigative *Terry* stop rather than reasonable, articulable suspicion. (Questions I and II).

The Fourth Amendment to the United States Constitution guarantees the right of the people "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." In Terry v. Ohio, 392 U.S. 1 (1968), the Court held that the Fourth Amendment is not violated by the stopping and brief detention of an individual for investigative purposes when the police have reasonable suspicion supported by articulable facts that the person is involved in criminal activity. See also, Minnesota v. Dickerson, 508 U.S. 366 (1993); Florida v. Royer, 460 U.S. 491

(1983); U.S. v. Mendenhall, 446 U.S. 544 (1980). The determination as to whether a particular stop is valid is to be based on the totality of the circumstances before the officer at the time of the stop. Florida v. Royer, supra; Terry v. Ohio, supra.

In making the determination as to whether reasonable suspicion existed to warrant a stop, the trial court is to give due consideration to the fact that "trained, experienced police officer[s are] able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer." Brown v. Texas, 443 U.S. 47, 52 at n. 2 (1979). See also United States v. Cortez, 449 U.S. 411 (1981). Circumstances to be considered in determining whether reasonable suspicion of criminal activity can include: prior experience of the officer with the person to be acosted, furtive or suspicious actions on the part of the person acosted, the characteristics of the area where the stop occurs, and the time of the stop, whether late at night or not.[3] See Sibron v. New

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[3] Each of these factors were present in the case at bar -- high crime/drug area, early morning hours, and evasive and unusual behavior on the part of Respondent.

York, 392 U.S. 40, 66 (1966); Day v. Commonwealth, 407 S.E.2d 49, 51-52 (Va. App. 1991). However, it is to be noted that "[r]easonable suspicion is a less demanding standard than probable cause." Alabama v. White, 496 U.S. 325, 330-331 (1992). See also United States v. Sokolow, 490 U.S. 1 (1989); United States v. Montoya de Hernandez, 473 U.S. 531, 541 (1985); Adams v. Williams, 407 U.S. 143 (1972).

The South Carolina Court of Appeals reached its conclusion that the stop in the present case was not supported by articulable reasonable suspicion because:[4]

> [1] The officers did not see a drug transaction and did not even see Fowler throw anything down.
> [2] The trial judge found he "most likely disappeared behind the nearby houses to follow well-worn paths across

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[4] The South Carolina court also had some concerns about the police being proactive rather than reactive. However, as this Court has consistently recognized and upheld, police are constitutionally allowed to prevent crime from occurring by conducting investigative stops or field interviews if reasonable articulable suspicion exists that the suspect is engaged in criminal activity. See *e.g.*, Terry v. Ohio, 392 U.S. at 22.

> broken fences" in his own neighborhood.
> [3] The officers, who knew Fowler had a prior drug conviction, basically made broad generalizations about his demeanor as they saw him leaving the curtilage of a suspected drug house.

State v. Fowler, Op. No. 2490 at 21 (S.C. Ct. App. March 25, 1996). In reaching this holding, the Court of Appeals misinterpreted and applied federal constitutional law.

The Court of Appeals appears to have misunderstood the police officers' testimony as to why they stopped the Respondent. As indicated in the record on appeal, the officers did in fact stop him to conduct a field interview. But as set forth in the Statement of the Case, they did so only after they possessed reasonable articulable suspicion that he was engaged in criminal activity -- such an interview being allowed under Terry v. Ohio, supra, and its progeny.

Moreover, the fact that the police neither saw Respondent in an actual drug transaction nor in possession of drugs prior to their approach is irrelevant because the Courts have never required the police to actually see a suspect commit a crime -- e.g., distributing or possessing a drug --

before the police may affect a stop for articulable reasonable suspicion of criminal activity. In fact, the state court's reading of such a requirement into the law runs afoul of Terry v. Ohio, supra, and its progeny, by changing the standard to *at least* the greater standard of probable cause, which is defined as simply a reason to believe that the accused is guilty of the crime charged. Compare Alabama v. White, supra (reasonable suspicion is lesser standard than probable cause); United States v. Sokolow, supra (level of suspicion required is less than probable cause); United States v. Montoya de Hernandez, supra (reasonable suspicion is less than probable cause); Adams v. Williams, supra (standard for *Terry* stop and frisk is less than probable cause).

Additionally, the Court of Appeals's reliance upon the fact that Respondent was stopped near his house and could have been using paths behind houses to get to his house is misplaced. As set out in the Statement of the Case, the police, who did not know at the time of the stop where Respondent lived, testified that they saw Respondent cut through yards in an attempt to evade them; Respondent, who testified

that he did not cut through any yards, testified that he was near his residence when he was stopped. The fact that Respondent headed toward his home taking the most direct route only corroborates the officers' testimony to the effect that he was quickly moving away in an attempt to evade them.

The last basis for the Court of Appeals's conclusion that the police lacked articulable suspicion was that the officers, knowing of Respondent's prior drug conviction, just "made broad generalizations about his demeanor". In making this finding, the Court ignored the mandate of this Court to look at the totality of the circumstances -- in this case, those circumstances including not only the actions of Respondent upon seeing the officers, but also the fact that at least one officer knew Respondent well and had a basis for judging his demeanor on that particular occasion.

As testified to by the officers, the circumstances known to them at the time of the stop were:

-- Respondent had a prior drug conviction;
-- he was in an area known for both high crime rates and drug activity at approximately 1:20 a.m.;

-- he was seen coming from the front yard of a known or suspected drug house with another individual from whom he separated;
-- he appeared frightened upon seeing the officers;
-- instead of waving to or talking with Officer Blair as he normally did, he acted differently;
-- he changed direction and began walking briskly away upon seeing the officers;
-- he looked back over his shoulder at the officers as he walked briskly away from them;
-- he cut behind some houses in what was perceived by the officers to be an attempt to elude them and then returned to the sidewalk on the other side of the block walking quickly; and
-- due to Respondent's suspicious behavior, the officers stopped him to conduct a field interview.

In Terry v. Ohio, supra, the United States Supreme Court reviewed the facts present therein which were held to give rise to an articulable reasonable suspicion to not only stop the suspects, but also to search them. The facts relating to that stop were as follows:

-- while on patrol in the downtown area, a police officer saw two men walk

separately back and forth in front of a store and look into the store's window several times and then meet and talk;

-- the officer saw a third man join the first two men and, after a brief conversation he left them;

-- after the two men then resumed their pacing back and forth in front of the store for 10-12 more minutes, they left the area, walking in the direction the third man had previously gone; and

-- the officer, suspecting that the men were casing the store for the purpose of committing a robbery and fearing that they might have a gun, stopped the three men when he saw them meet up in front of another store.

The facts present in the case at bar, especially as compared to Terry v. Ohio, supra, clearly gave rise to reasonable articulable suspicion that Respondent was engaged in criminal activity. See Florida v. Royer, supra; Terry v. Ohio, supra. His stop by the police was therefore constitutionally permissible. The state appellate court erred in finding no reasonable suspicion and in thereafter suppressing evidence seized from Respondent

and his post-arrest statement.[5]

II.

The South Carolina Court of Appeals incorrectly interpreted and applied this Court's ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), and its progeny so as to require the police to have either previously personally found a weapon on an individual or know the individual has been convicted of carrying a weapon before a Terry frisk for weapons can be conducted. (Question III).

As set forth below, the trial court held that the pat-down of Respondent was unconstitutional.

> Secondly, the Court finds the search, or frisk, of the Defendant to have been unconstitutional under the Terry standard. The officers articulated no objective suspicion

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[5] The South Carolina appellate courts do not appear to be alone in applying a higher standard to Terry stops than that intended by this Court. See *e.g.*, Mayhue v. State, 659 So.2d 417 (Fla. App. 2 Dist. 1995) (court held evidence that police officer saw individual pushing large television around in shopping cart at 6:40 a.m. in area known for criminal activity and then again at 7:30 a.m. only four blocks from the first sighting did not constitute reasonable articulable suspicion to conduct a Terry stop).

> that the Defendant possessed a weapon. Officer Blair testified that despite a suspected history of possession of a weapon, the Defendant had no prior weapon charges nor had he ever previously found one on the Defendant during previous searches. (Transcript, pp. 32-33.) Officer Campbell testified that the Defendant did not do anything during the night of the arrest to make Officer Campbell think that he might be armed. (Transcript, p. 52.)

(ROA pp. 4-5). Inasmuch as the initial stop of Respondent was proper as set forth in Argument I, the question then becomes whether the pat-down of Respondent's person was justified.

In Terry v. Ohio, supra, this Court held that, assuming a proper stopping for investigation, a protective search, or frisk, is permissible when there is reason to believe that the suspect may be armed and dangerous. Minnesota v. Dickerson, supra; Michigan v. Long, 463 U.S. 1032 (1983); Adams v. Williams, supra; W. LaFave, Search and Seizure, §9.4 (2nd ed. 1987).

> Terry further held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," the officer may conduct a patdown search "to determine whether the person is in fact carrying a weapon." "The purpose of this limited search is not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...."

Minnesota v. Dickerson, ___ U.S. ___, 113 S.Ct. at 2136 (1993).

In Terry v. Ohio, supra, this Court set down the facts present therein which were held to give rise to an articulable reasonable suspicion to not only stop the suspects, **but also to search** them. Those facts were as follows:

> -- while on patrol in the downtown area, a police officer saw two men walk separately back and forth in

front of a store and look into the store's window several times and then meet and talk;

-- the officer saw a third man join the first two men and, after a brief conversation he left them;

-- after the two men then resumed their pacing back and forth in front of the store for 10-12 more minutes, they left the area, walking in the direction the third man had previously gone;

-- the officer, suspecting that the men were casing the store for the purpose of committing a robbery and fearing that they might have a gun, stopped the three men when he saw them meet up in front of another store; and

-- the officer, who was not acquainted with any of the men, asked them for their names and then patted Terry down; after his pat-down revealed a gun in Terry's overcoat, the officer led all three men into the store where he proceeded to pat-down the other two men, finding a gun in a coat of one of the men.

It should be noted that the only objective basis for the officer's belief that the defendants in Terry v. Ohio, supra, might be armed is that he thought they might be casing the store for robbery and might a gun

to accomplish such -- no weapon was seen nor did the officer have any information that any of the men had ever carried a weapon. The facts present in the case at bar, especially as compared to Terry v. Ohio, supra, are clearly much stronger in terms of giving rise to a reason to believe that Respondent might be armed.

At the time Respondent was stopped, the officers' knowledge included their knowledge that persons who dealt with drugs were often armed[6] and Officer Blair's knowledge that Respondent, a convicted drug offender, had previously been seen carrying a gun by another officer. That knowledge, along with the fact that Respondent was stopped during the early morning hours in a high crime area after apparently leaving the yard of a suspected crack house and trying to elude them, gave rise to an objective reason to believe that Respondent might be armed. The fact that Officer Blair, who had previously searched Respondent, had not previously discovered a weapon on him is irrelevant in

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[6] In fact, it would appear that due to the daily reports of shootings and gun charges related to drug activity, a person involved in illegal drug activity is just as likely to carry a weapon as a person who commits robberies.

light of his knowledge that another police officer had seen Respondent with a gun. See Adams v. Williams, 407 U.S. 143 (1972) (reasonable suspicion for stop and frisk does not have to be based solely on officer's personal observations but may be based on information supplied by another person if indicia of reliability present). Moreover, the validity of this reliance on the collective knowledge or experience of the police with Respondent is supported by his admission during the suppression hearing that he almost always carried a knife on his person and, in fact, had had it on him when previously searched. The pat-down of Respondent was proper and the seizure of the knife, the nature of which would be immediately identifiable upon the pat-down of Respondent's pants, was constitutionally permissible. Minnesota v. Dickerson, supra; Michigan v. Long, supra; Adams v. Williams, supra.

Therefore, the South Carolina Court of Appeals erred in first holding that there was no objective basis from which the police could have believed that Respondent was armed and in thereafter suppressing the evidence seized from Respondent and his post-arrest statement because of its

finding.

CONCLUSION

WHEREFORE, Petitioner prays that this Petition for Writ of Certiorari to the South Carolina Court of Appeals be granted, that the Opinion of the Court of Appeals be vacated; that this Court issue an Opinion reversing the trial court's order so as to uphold the stop and pat-down of Respondent as constitutional and render the evidence subsequently obtained admissible at trial; and for such other further relief as this Court deems just and proper.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

* Counsel of Record

March 19, 1997

ALC

APPENDIX

From letter dated December 19, 1996, from Clyde N. Davis, Jr., Clerk of the Supreme Court of South Carolina, Post Office Box 11330, Columbia, S.C. 29211:

Re: The State v. Marcus Fowler

Dear Counsel:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of Certiorari denied.

s/ Ernest A. Finney, Jr. C.J.
For the Court

December 19, 1996."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

From letter dated June 20, 1996, from Kenneth A. Richstad, Clerk of the South Carolina Court of Appeals, Post Office Box 11629, Columbia, S.C. 29211:

Re: The State v. Marcus A. Fowler

Dear Counsel:

Enclosed is copy of Order of the Court denying your Petition for Rehearing en banc in the above case.

Your Petition for Rehearing has been denied in the following Order:

"Petition for Rehearing is denied.

s/William T. Howell, C.J.
s/Jasper M. Cureton, J.
s/ Carol Connor, J.

Columbia, South Carolina
June 20, 1996."

The Remittitur will be held for a period of thirty days until the time to Petition for Writ of Certiorari has expired, after which it will be forwarded to the trial court.

Please notify this office, in writing, within ten (10) days from the date of this letter, whether or not you want any of the remaining records we may have in this case. If we have not heard from you by that date, the records will be destroyed.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

The State.....Appellant,

v.

Marcus A. Fowler.....Respondent.

Appeal from Charleston County
R. Markley Dennis, Jr., Circuit Court Judge

Opinion No. 2490
Heard January 11, 1996 - Filed March 25, 1996

AFFIRMED

Solicitor David P. Schwacke and Assistant Solicitor Amie L. Clifford, both of North Charleston, for appellant.

Assistant Appellate Defender Robert M. Pachak, of the SC Office of Appellate Defense, of Columbia, for respondent.

CONNOR, J. : The State charged Marcus A. Fowler with possession of a concealed weapon, possession of crack cocaine with intent to distribute, and possession of crack cocaine with intent to distribute within proximity of a school. Fowler moved to suppress evidence found on him when he was arrested. The circuit court granted the motion, holding the stop and search of Fowler unconstitutional. The state appeals.

We affirm.

FACTS

On March 8, 1994, at approximately 1:20 a.m., Officers Timothy J. Blair and Richard G. Campbell were routinely patrolling a "high drug area" in a marked police cruiser. Officer Blair saw Fowler come from the front yard of a suspected drug house. About fifteen minutes later, the officers saw Fowler again. Suspecting Fowler might be carrying a weapon, they stopped him and patted him down. They found a large lockblade knife in one pants pocket, and $504.87 in cash in another. They arrested him for violating a city ordinance against carrying a concealed weapon. At the jail they conducted a strip-search and found a clear plastic bag with crack cocaine wrapped around his penis.

Fowler moved to suppress evidence of the money and drugs found on him. The officers testified at the suppression hearing Fowler walked in a "suspicious manner, 11 acted "kind of scared, 11 and "appeared as if possibly he was (sic] trying to (elude] us." Their suspicions were also aroused because "he cut behind some houses" and "didn't come to the corner and make a right hand turn on the sidewalk like normal people would make that route . . . and then he got on the sidewalk and proceeded back on the sidewalk real fast -- at a fast walk." They also said they knew he had a conviction for prior drug offenses[7] and "was known to carry weapons, and his company with suspected drug dealers and persons known to

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[7] Fowler had one previous conviction for possession of crack cocaine.

carry weapons." Also Officer Blair stated he had known Fowler for about two and one-half years, and normally when he ran into him on the street, Fowler waved or came over to talk to him.

The officers acknowledged they had stopped Fowler to do a field interview, part of a "pro-active" mission to prevent crime. One officer described "pro-active" as:

> Pro-active is, we prevent crimes from occurring. We're out there to be seen, to stop and conduct field interviews, find out who's on the street and who lives where....
>
> There's nothing but drugs, prostitutes, murderers, rapists, stolen vehicles. Most individuals there do not have a home and they stay with grandparents or in vacant houses. Our objective is to be in the field and build profiles, which is to cruise the area -- if we see something that looks suspicious to try to figure out what it is.

The officer acknowledged Fowler, who lived three blocks from where he was first seen that night, did not do anything to make the police believe he was armed or involved in drug activity.

After hearing this testimony, the judge granted Fowler's motion to suppress the evidence. He found both the police stop and the frisk unconstitutional under *Terry v. Ohio*, 392 U.S. 1 (1968).

ANALYSIS

The State argues the trial court erred in finding there was no reasonable suspicion for the police to stop Fowler.

The police may stop, and briefly detain, a person for investigative purposes when an officer has a reasonable suspicion supported by articulable facts the person is involved in criminal activity. *State v. Morris*, 312 S.C. 116, 439 S.E.2d 291 (Ct. App. 1993); *State v. Foster*, 269 S.C. 373, 237 S.E.2d 589 (1977), *citing Terry v. Ohio*, 392 U.S. 1 (1968); *State v. Robinson*, 306 S.C. 399, 412 S.E.2d 411 (1991) (to justify a brief stop and detention, the police officer must have a reasonable suspicion the person has been involved in criminal activity); *State v. Gilbert*, 273 S.C. 690, 258 S.E.2d 890 (1979) (the officer must have an "articulable and reasonable suspicion" of criminal activity to stop a person), *overruled on other grounds by State v. Torrence*, 305 S.C. 45, 406 S.E.2d 315 (1991).

Here the facts do not support the State's position the officers had an articulable suspicion Fowler was involved in criminal activity. The officers did not see a drug transaction and did not even see Fowler throw anything down. The trial judge found he "most likely disappeared behind the nearby houses to follow well-worn paths across broken fences" in his own neighborhood. The officers, who knew Fowler had a prior drug conviction, basically made

broad generalizations about his demeanor as they saw him leaving the curtilage of a suspected drug house.

We note we do not reach the issue of whether the search was constitutional because we affirm the suppression of the evidence based on an unconstitutional stop. However, even if the *Terry* stop were proper, before the police may frisk a defendant, they must have a reasonable belief the defendant is armed and dangerous. *Ybarra v. Illinois,* 444 U.S. 85 (1979). In other words, a reasonable person in the position of the officer must believe the frisk was necessary to preserve the officer's safety. *Terry v. Ohio,* 392 U.S. 1 (1968). An officer must be able to specify the particular facts on which he or she based his or her belief the suspect was armed and dangerous. *Sibron v. New York,* 392 U.S. 40 (1968) (an officer is not entitled to seize and search every person on the street; mere knowledge of the suspect being a known narcotics dealer who put his or her hand into a pocket as the police approached does not provide justification); *cf. United States v. Moore,* 817 F.2d 1105 (4th Cir. 1987) (justification found where suspect was observed in the vicinity of a building late at night, shortly after the alarm sounds, and the street is dark, the officer is alone, and the suspected crime is burglary), *cert. denied*, 484 U.S. 965 (1987).

Although one officer testified Fowler had a history of possessing weapons, Fowler had no prior weapons charges. Moreover, during previous searches, the police had not found weapons on Fowler. Another officer testified Fowler did not do anything the night of the arrest to make him think Fowler might be armed. These facts do not articulate a reasonable suspicion the

officers believed the frisk was necessary to protect themselves or others.

AFFIRMED.

HOWELL, C.J. and CURETON, J., concur.

ORDER OF SUPPRESSION

This matter came before this Court on August 18, 1994 upon motion of Laura Fannin, Esq., counsel for the Defendant, Marcus A. Fowler, to suppress all evidence obtained from the Defendant by the North Charleston Police Department as the result of a seizure of Defendant and search incident to arrest. Present at the hearing before the Honorable R. Markley Dennis, Jr., were Laura Fannin, Assistant Public Defender, and Michael DuPree, Esq., and Douglas Sumner, Esq., Assistant Solicitors for the Ninth Judicial Circuit.

Testimony was presented at the hearing by Officer Timothy J. Blair and Officer Richard G. Campbell, both of the North Charleston Police Department, and Defendant, Marcus A. Fowler. Officers Blair and Campbell testified to being on patrol duty in North Charleston in the early morning hours of March 8, 1994 when they observed

the Defendant coming from the vicinity of an alleged drug house. Officer Blair stated that they cruised past the Defendant and recognized him as having been involved in past drug activity and suspected in carrying weapons. (Transcript of hearing, August 18, 1994, p. 6.) Both officers testified that the Defendant appeared to be extremely surprised and scared. Officer Campbell turned the patrol car around to question the Defendant, at which time the Defendant darted behind several houses then returned to the sidewalk, walking very quickly. As the officers stopped and approached the Defendant, "he looked both ways, looked around, and then he just stood there." (Transcript, p. 9.) Officer Blair patted the Defendant down for their safety and discovered a lockblade knife. The officers placed the Defendant under arrest and in turn seized a large amount of cash and a bag of crack cocaine on his person. Despite

being fully advised of his constitutional rights, the Defendant later gave the officers a detailed, self-incriminating statement.

Counsel for the Defendant chiefly relied upon the United States Supreme Court decision in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, ___ L.Ed. ___ (1968), which set forth the constitutional boundaries for a law enforcement officer's seizure and subsequent search of a defendant. Terry requires an officer to first have a reasonable suspicion of criminal activity before "seizing", or stopping, a defendant. Furthermore, the officer must have a reasonable suspicion of a defendant possessing a weapon before searching the defendant's outer garments. The constitutional test is an objective one; thus, the Court must examine the totality of the circumstances surrounding the events in question.

First, the Court finds the seizure of the Defendant to have been unconstitutional under the guidelines of Terry. The officers had no specific basis to reasonably believe that criminal activity was afoot. Both officers stated that they stopped the Defendant to conduct a field interview. (Transcript, pp. 22, 45.) The mere facts that the Defendant had a prior drug charge, was spotted in a high crime area, came from the curtilage of a known drug house, and appeared to elude the officers do not amount to a reasonable suspicion of criminal activity. The testimony additionally showed that neither officer observed a drug transaction (Transcript, pp. 24, 53.) nor saw the Defendant exit the alleged drug house (Transcript, pp. 23, 42.). Testimony indicated that the Defendant was actually near his house (Transcript, p. 57.) and most likely disappeared behind the nearby houses to follow well-worn paths across broken

fences (Transcript, pp. 40-41.).

Secondly, the Court finds the search, or frisk, of the Defendant to have been unconstitutional under the Terry standard. The officers articulated no objective suspicion that the Defendant possessed a weapon. Officer Blair testified that despite a suspected history of possession of a weapon, the Defendant had no prior weapon charges nor had he ever previously found one on the Defendant during previous searches. (Transcript, pp. 32-33.) Officer Campbell testified that the Defendant did not do anything during the night of the arrest to make Officer Campbell think that he might be armed. (Transcript, p. 52.)

THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that all evidence obtained from the Defendant, Marcus A. Fowler, by the North Charleston Police Department as the result of the illegal, unconstitutional search and seizure on March 8, 1994 including but not

limited to a knife, Five Hundred Fifty-four ($554.00) Dollars, one bag of crack cocaine, and an incriminating statement is hereby suppressed and shall not be used as evidence by the State of South Carolina in prosecuting the Defendant.

AND IT IS SO ORDERED!

R. MARKLEY DENNIS, JR.
JUDGE, NINTH JUDICIAL CIRCUIT

MONCKS CORNER, SOUTH CAROLINA
DECEMBER 20, 1994